No. 84-116

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER, M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT, JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HERMAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O., JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D., DON L. McKELVEY, D.C., GORDON E. MAXWELL, M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO, M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER, D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D., RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX A. WRIGHT, D.C., THE STATE OF KANSAS, and THE KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

REPLY OF PETITIONER TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY OF PETITIONER TO THE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. RESPONDENTS IMPROPERLY ALLEGE FACTS AND DEFENSES THAT ARE IMMATERIAL TO THIS COURT'S REVIEW OF THE SUMMARY DISMISSAL OF PETITIONER'S CLAIMS IN THE TRIAL COURT BELOW.

Respondents' brief contains a dozen pages of self-serving and largely unsubstantiated allegations in a so-called "Statement of Case." Respondents shamelessly seek

to garner the sympathies of the Court by describing petitioner as an object of an investigation by the State Board for abuse of prescription practices. Respondents fail to state, however, the final result of that investigation. All charges against Petitioner were dismissed as being factually baseless, following the filing of petitioner's action in federal court.

Indeed, the lengthy recitation by respondents of their fruitless investigation is irrelevant to the issues before this Court. Respondents must know that this Court will not provide *de novo* review nor allow respondents to engage in a manipulation of the extremely limited record developed in the trial court.

To the contrary, it is axiomatic that review of any summary dismissal by a trial court necessitates that the claims of plaintiff be taken as true and in the light most favorable to plaintiff. This same rule was recently reaffirmed by the Fifth Circuit in circumstances similar to this case.

> Because we consider a Rule 12 dismissal, our record is slim and our standard generous: we may affirm only if it appears beyond doubt that [plaintiff] can prove no set of facts in support of his claim that would entitle him to relief.

Bishop v. State Bar of Texas, 736 F.2d 292, 295 (5th Cir. 1984) (citing *Conely v. Gibson,* 355 U.S. 41, 45-6 (1957) and *Jones v. United States,* 729 F.2d 326, 330 (5th Cir. 1984)).

Indeed, respondents' version of the facts is particularly inconsequential in this case, as the trial court did not grant the motion to dismiss because of any factual insufficiency as to petitioner's claim, rather the dismissal was based upon the trial court's finding that the Board and its members

were entitled to full judicial immunity and that federal courts should abstain from such controversies as a matter of law.

II. RESPONDENTS' ASSERTION THAT THE FEDERAL DISTRICT COURT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS IS WITHOUT MERIT.

Respondents' first argument in response to the petition is that the Federal District Court lacked subject matter jurisdiction over this controversy. Respondents' Brief at p. 14. This same hapless argument was briefed by respondents in the Tenth Circuit below, but the court of appeals did not even mention the point in its decision.

Quite simply, this argument has nothing whatsoever to do with the issues before this Court. Respondents merely attempt to muddy the waters by attempting somehow to analogize the so-called "Theard Doctrine" to this case.

The Theard Doctrine was developed from a trio of decisions from this Court in 1957. *Theard v. United States,* 354 U.S. 278 (1957); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232 (1957); *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957). This doctrine simply states that Federal District Courts do not have jurisdiction to review the decisions of a state's supreme court concerning the denial or revocation of bar licenses. This rule is designed to promote comity between the state and federal system so that a Federal District Court will not sit in review of a discretionary decision of the state's highest court. Rather, appeal must be directly to the United States Supreme Court.

Respondents offer a puzzling extrapolation of the Theard Doctrine to argue that the State Board of Healing Arts deserves the same deference as the Kansas Supreme

Court. This ill-conceived notion was not even addressed by the Tenth Circuit, and is plainly unsupportable in law and in logic. To hold that no federal subject matter jurisdiction exists over a state board and its members would be tantamount to granting the board a sort of "super-immunity," nullifying the clear dictates of this court in such cases as *Stump v. Sparkman,* 435 U.S. 349 (1978), *Butz v. Economou,* 438 U.S. 478 (1978), and *United States v. Lee,* 106 U.S. 196 (1882) ("No officer of the law may set that law at defiance with impunity.")

Certiorari should be granted by this Court in order to defuse the state's hopes of constructing for itself this sort of "super-immunity."

III. RESPONDENTS ERRONEOUSLY IDENTIFY THE ELEVENTH AMENDMENT JURISDICTIONAL BAR AS AN ISSUE IN THIS CASE, WHILE IGNORING THE TRUE ISSUE CONCERNING PETITIONER'S DIRECT RIGHT OF ACTION UNDER THE FOURTEENTH AMENDMENT.

Respondents write in detail about the eleventh amendment prohibition against suits naming a state as a defendant. This is not an issue, however, as Petitioner has conceded from the beginning that his damage claim under 42 U.S.C. § 1983 is so barred. The State of Kansas is named as a defendant only as to Petitioner's claim under the fourteenth amendment as authorizing a direct right of action under the egregious circumstances presented in this case. Because this action arises directly under the fourteenth amendment, the immunity afforded states by the eleventh amendment does not apply. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Respondents ignore the true issue before this Court by offering the bare conclusion that the fourteenth amendment claim is a "non-issue." Respondents' unwillingness to face the issue should not deter this Court from addressing this important question which was slighted by the Tenth Circuit's decision below. *Vakas v. Rodriquez*, 728 F.2d 1293, 1296 (10th Cir. 1984).

IV. RESPONDENTS' ANALYSIS OF THE STANDARD OF IMMUNITY THAT SHOULD BE APPLIED TO THE STATE BOARD IS SIMPLY A RESTATEMENT OF THE FAULTY REASONING DEVELOPED BY THE TENTH CIRCUIT.

Respondents ask this Court to refuse to correct the aberrant standard for judicial immunity developed by the Court below: if a "facial review" of the statutes under which a state administrative agency operates reveals that the agency has a single function that resembles a quasi-judicial activity, then the agency automatically gains full judicial immunity for whatever actions it takes, whether or not such activity bears any relationship to the applicable statutes. *See Vakas*, 728 F.2d at 1296-7.

The concept of reviewing the enacting statutes of an agency instead of the agency's activity itself to determine the appropriate standard for immunity has absolutely no precedent in this Court or any other circuit. The writ should be granted to rectify the Tenth Circuit's misconception of the appropriate method to determine the proper measure of immunity for state administrative agencies.

Even if respondents could properly claim general quasi-judicial immunity for its normal operations based upon a facial review of the board's underlying state statutes, such immunity would be dissolved in this instance because the board's actions against petitioner were "in clear absence

of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). Respondents' actions against petitioner began with vexatious efforts to unjustifiably subject petitioner to the state power wielded by the board, and ended with personal self-protecting attempts by individual members of the board to use their power to extort a release from petitioner in order to shield them from the consequences of their abuses. Respondents blithely assume that *Stump* was intended to countenance such affirmative violations of a physician's civil rights. This Court should set them straight.

A purely personal abuse of state power by board members to coerce petitioner's signature on a release of claims certainly does not qualify as being within the jurisdiction of the board. The board was not concerned with its responsibility to the healing arts profession in Kansas. Rather, the Board members were engaged in a desperate attempt to deflect the consequences of their unlawful proceedings against the petitioner. They abused their public office toward that end by threatening reinstitution of the same baseless charges unless petitioner would sign the release. A judicial entity that wrongfully engages in a prosecutorial action designed to make possible a violation of an individual's civil rights, with the use of state power, loses all immunity for such action. *Lopez v. Vanderwater*, 620 F.2d 1229, 1236 (7th Cir. 1980).

V. RESPONDENTS' ARGUMENT ON THE ISSUE OF ABSTENTION INCORRECTLY APPLIES THE HOLDING IN MIDDLESEX TO THIS CASE.

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), this Court held that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) applied to attorney disciplinary proceedings be-

cause such proceedings contained sufficiently important state interests. Federal courts, therefore, should defer to state courts where attorneys have ample opportunity to raise their constitutional claims.

The trial court below relied heavily on *Middlesex* in dismissing petitioner's claims. The Tenth Circuit, however, gave only a passing comment concerning the *Middlesex* decision, noting:

> The principles of comity and federalism dictate that federal courts *abstain from premature entry* into state judicial construction of administrative disciplinary procedures.

Vakas 728 F.2d at 1297 (citing *Middlesex*) (Emphasis added).

The court's reference to abstention from "premature entry" into state proceedings is an apparent recognition of the qualification contained in *Middlesex,* that bad faith or repeated harassment by the state will justify federal intervention. 457 U.S. at 436.

Petitioner in this case resorted to the federal courts only after having undertaken the state appeal process from the state board's proceedings and thereafter being exposed to renewed threats of further prosecution by the board. Nothing in the *Middlesex* holding requires a litigant to forever weather harassment from the state system while attempting to press constitutional claims.

> Although Texas disciplinary proceedings are capable of deciding constitutional challenges to specific procedures, recourse in those proceedings is not a sufficient avenue to remedy the constitutional injury done by bad faith proceedings themselves. The right under *Shaw* [*v. Garrison,* 467 F.2d 113 (5th Cir.), *cert. denied,* 409

> U.S. 1024 (1972)] is *to be free of bad faith charges and proceedings, not to endure them until their speciousness is eventually recognized.*

Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984) (Emphasis added).

The Tenth Circuit erred by categorizing petitioner's claims as "premature." Federal intervention was compelled by the board's harassing threats to renew proceedings unless petitioner would submit to signing away his claims through a release.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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